Supreme Court, U.S.
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No. 98-1173

In The

Supreme Court of the United States

October Term, 1998

CITY OF ATLANTA, GEORGIA,

Petitioner,

v.

R. MAYER OF ATLANTA, INC.; TONY N. UPCHURCH d/b/a CHUCK'S TRUCK; REGINA JENKINS d/b/a JENKINS WRECKER SERVICE CO.; FRED BURT d/b/a QUALITY WRECKER SERVICE; and UPMAN'S WRECKER SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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ARGUMENT

I. THE ELEVENTH CIRCUIT SHOULD HAVE LIMITED ITS OPINION TO THE FACTS OF THIS CASE.

A. RESPONDENTS CONCEDE THAT THIS CASE INVOLVES ONLY CONSENSUAL TOWING PERFORMED BY TOWERS WHO ARE LOCATED OUTSIDE THE CITY OF ATLANTA CORPORATE LIMITS, AND THE ELEVENTH CIRCUIT SHOULD HAVE LIMITED ITS OPINION TO SUCH FACTS.

In their brief in opposition to the City of Atlanta's Petition, Respondents concede that the case *sub judice* involves a challenge to certain sections of the City's Wrecker Ordinance only to the extent that these sections apply to towers who are located outside the corporate limits of the City of Atlanta who perform consensual towing. (Resp. Br. pp. 1, 2, 3, 12). However, in its decision, the Eleventh Circuit declares that three provisions of the City's Wrecker Ordinance are unenforceable as they apply to all types of towing, not just consensual towing. (Pet. App. 22-23). Respondents assert that the issues related to nonconsensual towing should not be addressed in this case because such issues are currently pending in the United States Court of Appeals for the Fifth Circuit case of *Cardinal Towing & Auto Repair, Inc., et al. v. The City of Bedford, Texas, et al.*, No. 98-1-194 (Resp. Br. pp. 11, 12). Although Petitioner agrees that the instant matter does not involve nonconsensual towing, it is imperative that the Court reject Respondents' arguments and review the Eleventh Circuit's decision since it clearly

declares that the regulation by local governments of non-consensual towing other than to set the price of such tows is prohibited pursuant to 49 U.S.C. § 14501(c). The opinion of the Eleventh Circuit establishes bad precedent which will not be disturbed unless this Court invokes its discretionary authority to review such decision.

B. THE ELEVENTH CIRCUIT ERRONEOUSLY DECLARED THAT SECTION 162-223(c) IS UNENFORCEABLE EVEN THOUGH SUCH SECTION WAS NOT CHALLENGED BY RESPONDENTS.

In this action, Respondents chose only to challenge two sections, Sections 162-223(a) and (c), of the many provisions of the City's Wrecker Code. (Pet. App. p. 25, ¶ 1; p. 30, ¶ 18; p. 31, ¶ 24). However, in its decision, the Eleventh Circuit not only determined that these challenged sections are unenforceable, but it also improperly declared that Section 162-223(b) is unenforceable even though such section was not challenged. (Pet. App. 14, 22, 23). In ruling that this section is unenforceable, the Eleventh Circuit clearly addressed an issue about which it should not have opined, and such opinion should be reversed.

II. RESPONDENTS HAVE FAILED TO PRESENT ARGUMENT AS TO WHETHER STATES ARE PROHIBITED FROM DELEGATING TO THEIR POLITICAL SUBDIVISIONS THE AUTHORITY TO REGULATE CERTAIN ASPECTS OF THE TOWING INDUSTRY PERTAINING TO SAFETY, ROUTE CONTROLS AND INSURANCE.

Although Respondents argue that the regulation of "routes and services" of towers by State and local governments is preempted pursuant to 49 U.S.C. § 14501(c)(1) (Resp. Br. pp. 7, 10), and that the City's ordinances regulate route and/or service (Resp. Br. p. 5), Respondents offer absolutely no response to rebut Petitioner's argument that, pursuant to the exception found in 49 U.S.C. § 14501(c)(2)(A), States shall not be restricted from delegating to their local governments the authority to regulate towing for safety, certain route controls and insurance purposes. As regards State authority to regulate for these purposes, the Eleventh Circuit found that pursuant to the express language of 49 U.S.C. § 14501(c)(2)(A), States can enact laws which are related to these matters. However, the Eleventh Circuit further held that, pursuant to the same language, States are not authorized to delegate such authority to local governments. Respondents' complete failure to address this matter indicates that the Eleventh Circuit's opinion on this issue is tenuous at best.

As has previously been asserted in the City's Petition, the Eleventh Circuit's decision should be reversed because Congress did not expressly prohibit the States from delegating authority regarding certain aspects of the towing industry to their political subdivisions. Rather, by enacting 49 U.S.C. § 14501(c)(2)(A), Congress explicitly

and emphatically stated that the authority of a State to regulate for these purposes shall not be restricted. (Pet. App. 69-70).

Clearly, in determining that States may not delegate such regulatory authority to their political units, the Eleventh Circuit did not consider the severe ramifications of its ruling. By prohibiting States from delegating the authority to regulate for the above-described purposes, the towing industry is left almost completely unregulated. As has been discussed in the City's Petition, there exists no federal regulatory scheme which encompasses the towing industry. Nor does there exist any meaningful state regulation, at least in the State of Georgia and those other states in which lie the cities which have participated in this case as Amici Curiae, over the towing industry because the States have traditionally left such matters to local government. For instance, the State of Georgia relies on its political subdivisions to perform investigations pertaining to criminal history and driving records of tow truck operators. The inability of local governments to perform such investigations places the safety of the public in jeopardy.

III. SECTIONS 162-223(a)-(c) OF THE CITY'S WRECKER CODE ARE CLEARLY RELATED TO PUBLIC SAFETY AND INSURANCE REQUIREMENTS AND DO NOT RELATE TO THE ROUTE OR SERVICE PROVIDED BY A MOTOR CARRIER.

Assuming *arguendo* that this Court accepts Petitioner's position and declares that, pursuant to 49 U.S.C. § 14501(c)(2)(A), States are permitted to delegate to their

local governments the authority to regulate certain aspects of the towing industry, then the Eleventh Circuit's determination that Sections 162-223(a)-(c) are unenforceable should be reversed. In declaring these sections preempted, the Eleventh Circuit opined that they are " 'related to' the provision of consensual towing services because the ordinances limit who is permitted to provide the services and requires [sic] that individuals and companies satisfy various criteria before they provide the services." (Pet. App. 14). Respondents argue that the challenged sections of the City's Wrecker Ordinance relate to the route and/or service of motor carriers because the City's ordinance "prohibits the operation of a tow truck on "any of [its] streets". (Resp. Br. p. 5). Neither the Eleventh Circuit's holding nor Respondent's argument makes logical sense because these ordinances do not attempt to establish the routes upon which a tower may or may not travel and do business, nor do they require or prohibit any services that may be performed by a tower. Whether a tower obtains a license to operate in the City pursuant to Sections 162-223(a)-(c) has absolutely nothing to do with factors such as price, route or service. Instead, such licensure is based on factors that protect the public safety such as criminal history, driving records, and the maintenance of insurance, as is shown below.

Specifically, Section 162-223(a) requires that a license must be obtained prior to using or operating a wrecker on any street within the City limits. (Pet. App. 79-80). Section 162-223(c) prohibits the operation of a wrecker on city streets without first filing a registration of the vehicle by providing the following information:

(1) The make, model and manufacturer's serial number of the vehicle;

(2) Date the vehicle was put into service as a wrecker;

(3) The driver's license number of the owner, if an operator, and of all other operators of the wrecker;

(4) The name of the insurance company with which the owner and all operators have liability insurance coverage with respect to the operation of the vehicle, as required by law;

(5) The permit number of each person who shall drive or operate the vehicle on behalf of the owner; . . .

(Pet. App. 80-81). The public safety purposes of these sections become even more clear when they are read in conjunction with the remaining provisions of the City's Wrecker Code.

For instance, Section 162-223(b), which was not challenged in this lawsuit, requires that any person desiring to obtain a license to use or operate a wrecker must first apply for the license and provide information such as the place where the proposed business will be located, the nature and character of the business, the names of any partners or officers of the business, the charges to be imposed for various services, and the types of insurance held. (Pet. App. 80). The information sought in the application is clearly related to maintaining the general safety and welfare of the City's citizens and visitors and to ensure that minimal amounts of insurance are obtained by the company.

Another provision, Section 162-226(a), requires that any person driving, using or operating a wrecker in the city must first be fingerprinted and then be issued a permit indicating that this person is eligible to use, drive or operate a wrecker. (Pet. App. 85). Section 162-226(b) requires the police department to "conduct a complete search relative to any police record of the person fingerprinted." (Pet. App. 85). Section 162-226(e) provides in pertinent part as follows:

> No permit shall be issued to any person who has been convicted in this or any other country within three years immediately prior to the application for this permit of soliciting for prostitution, illegally dealing in narcotics, sex offenses or any other crime involving moral turpitude. Further, this permit shall not be issued to any person who, within the three years immediately preceding the application for this permit, has been convicted of three or more moving traffic violations. To be eligible for this permit, the person applying must possess a current driver's license as provided by the laws of the state. . . .

(Pet. App. 86). Furthermore, Section 162-232, requires that

> [t]he operator of any wrecker removing a private motor vehicle at the request of any person other than a police officer on duty for the department of police shall report to the department of police the fact that the vehicle was removed and its present storage place, together with a description of the vehicle and the tag number. The report shall be made by the wrecker operator by telephonic communication

> within one hour of the deposit of the vehicle at its storage point.

In addition to these sections, the City's Wrecker Code contains other provisions which impact public safety. (*See, generally,* Sections 162-223(d), 162-225, 162-227, 162-228, 162-229, 162-231, and 162-233 of the City Wrecker Code, Pet. App. 78-92). There can be no doubt that these ordinances do not regulate route or service but instead protect the general welfare and safety of the public. However, the Eleventh Circuit completely ignored these sections in analyzing whether the challenged ordinances pertain to public safety.

Not only did the Eleventh Circuit ignore these various other provisions of the City's Wrecker Code, but it also failed to consider important evidence presented to the district court that the challenged ordinances clearly pertain to public safety. The Affidavit of Atlanta Police Investigator W. P. Lipscomb, which was filed in the district court as part of Petitioner's response to Respondents' motion for summary judgment, establishes that the City has faced a problem with non-permitted towers who tow vehicles from city streets and do not report such tows. (App. 3-7). Investigator Lipscomb testified that it is imperative for public safety purposes that the City have access to certain information about towers doing business in the City, including the towers' business addresses, phone numbers and information about their drivers. (App. 5-6). Investigator Lipscomb further testified that the City Code requirements that permitted trucks must be properly marked with specific lettering and that all tows made at the request of any person other than an Atlanta

police officer must be reported to the police department within a certain amount of time assist the police department and protect the public from unscrupulous practices of towers who are not permitted. (App. 5-6).

Pursuant to the clear language of the exception found in 49 U.S.C. § 14501(c)(2)(A), as long as the City's regulation pertains to safety, certain route controls, or minimum insurance requirements, it will not be preempted even if it affects the price, route, or service of either the consensual or nonconsensual towing industry. The record in this case shows that in order to obtain a license to operate on city streets, all towers must meet the requirements set forth in the unchallenged provisions of the City's Wrecker Code. The record further establishes that all of the unchallenged provisions are related to either safety or insurance matters. Therefore, even if the Court construes the licensure requirements to affect either the price, route or service of the towing industry, the Court should still uphold such licensure requirements because they work in conjunction with the remaining provisions of the City's Wrecker Code and are clearly related to safety or insurance matters. As Petitioner has demonstrated, if the City does not have the ability to enforce the provisions which require that a tower obtain a license and register its vehicles and drivers prior to using a tow truck on City streets or any of the other provisions contained in the City's Wrecker Code, the criminal history and driver records of operators will not be investigated; the maintenance of insurance will not be supervised; there will be no reporting mechanism to the police department making it impossible to determine whether a car has been towed

or stolen; and the public will virtually be sitting prey for unscrupulous and unsafe tow truck operators.

CONCLUSION

Petitioner respectfully requests that its Petition for Writ of Certiorari be granted.

This the 12th day of March, 1999.

Respectfully submitted,

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DEFENDANT'S EXHIBIT I

* * *

AFFIDAVIT OF INVESTIGATOR W.P. LIPSCOMB

After being duly sworn, W.P. Lipscomb deposes and states the following:

1.

My name is W.P. Lipscomb. I am currently an investigator in the Auto Theft Section of the Criminal Investigation Division of the Atlanta Police Department. This affidavit is being given in support of Defendants' Response to Plaintiff's Motion for Summary Judgment in the above-styled case, and for any other purpose deemed proper by the Court. I give this affidavit based upon my personal knowledge. I am competent to make this affidavit.

2.

I have been an investigator in Auto Theft Section since December 1988. At the present time, I am the office investigator and have been in this position since mid-1990. In this position, my duties entail handling 85-90% of the total number of auto thefts reported in the City of Atlanta. Most of the cases I handle involve no lead cases or cases that have no solvability factor. My job is to ensure that all reports regarding abandoned and/or recovered stolen vehicles are accurate. For instance, if a victim wakes up one morning and finds that his car is gone, a teleserve operator will make a report which indicates the car was stolen. Thereafter, I look at all of the

paperwork regarding the vehicle and the report and determine whether the case can be solved. If the case has a lead, I give the paperwork to my sergeant who then reassigns the case to a street investigator.

3.

From 1988-1990, I worked as a street investigator five days a week, but currently, I work street duty one weekend out of every month. When performing street duty, my responsibility is to respond to uniform officers' requests for an auto theft investigator on the scene where arrests usually are made. In some instances, an officer who finds a car which appears to be stolen, whether such car is sitting idle or being driven, will ask for assistance from an auto theft investigator. Once I arrive on the scene, I handle the case from beginning to end. I will obtain any pertinent information from the uniform officer, and then he or she will return to service, and then I would handle the impound of the vehicle, and the arrest and incarceration of any person charged in connection with possession of the stolen vehicle.

4.

On a national average about 60-65% of motor vehicles reported stolen are recovered. The City of Atlanta falls within this range for the recovery of stolen vehicles. Therefore, around 30-35% of the vehicles stolen are not recovered.

5.

City of Atlanta police offices have authorization to impound vehicles abandoned on the expressway system if such vehicle remains on the expressway for more than an eight hour period. During the first part of 1992, I noticed that there appeared to be a number of cars that had been abandoned on the expressway that had not been impounded by the police department. Thus, I decided to investigate the situation and kept records for nine months regarding these abandoned vehicles. In January, 1992, I noticed that ten vehicles had been reported stolen from the expressway system. In February, 1992, I noticed that the number was nine vehicles. In March, 1992 seven vehicles were reported stolen. In April, 1992 and May, 1992, the number was twelve. In June, 1992 the number was sixteen. In July, 1992 there were nineteen reports. In August, 1992 twelve reports were made and in September, 1992, fourteen reports were made. Once I realized there was a pattern of problems with cars being stolen from the expressway system, I called other law enforcement agencies in the metropolitan area, such as Cobb County and Dekalb County, to relay my findings. These other jurisdictions expressed that they had equal problems in their respective areas.

6.

During the time that I was keeping these records, I was made aware by a victim that his vehicle had been towed to Central Metals, Inc., a metal processing company on Marietta Street. Central Metals operates equipment which can grind or crush all types of metals,

including vehicles. Auto Theft approached Central Metals and requested their assistance in regard to those persons who were bringing cars in to be crushed. Central Metals gave us access to all their records and provided us with lists [sic] all persons or companies who were crushing vehicles at their facility. We took these lists and checked all the cars that had been brought in to see if they had been reported stolen to any of the law enforcement agencies in the metropolitan area.

After conducting an investigation regarding the Central Metals records, we determined that numerous individuals/companies who possessed wrecker equipment were responsible for repeatedly bringing to Central Metals cars that had been reported stolen from either the expressway system, private residences or public streets, including those within the City of Atlanta and other police jurisdictions.

Warrants were obtained for the individuals who had brought the stolen cars to Central Metals. I was only responsible for handling one of the first cases that arose from the investigation. I signed four warrants for the arrest of one person, Kenneth Chestnutt. I have personal knowledge that Mr. Chestnutt was convicted on the charges of theft by receiving stolen property and sentenced to eight years in the state prison system.

The majority of the people for whom warrants were issued were not permitted by the City of Atlanta to operate a wrecker. Therefore, investigations took longer because we had no background information, such as business addresses, phone numbers, or driver information other than information which came from Central Metals,

a non-police agency. Our efforts in locating the persons who were stealing vehicles for crushing purposes would have been greatly enhanced had such persons been permitted by the City of Atlanta and had the trucks been registered with the City of Atlanta.

7.

The City of Atlanta's wrecker ordinance assists us in our work because it provides guidelines by which all wrecker companies must abide. For instance, companies authorized to operate in the City of Atlanta are required to be marked appropriately with specific lettering (See City Code Section 162-228). Such markings assist private citizens in their ability to aide police officers with information regarding wreckers which have picked up vehicles on City streets or private property within the City either legally or illegally.

In addition, pursuant to City Code Section 162-232, companies permitted by the City of Atlanta are required to notify the Atlanta Police Department when they remove a private motor vehicle at the request of any person other than a police officer on duty for the Atlanta Police Department. The notice is required to be made within one hour of the deposit of the vehicle at its storage point. (City Code Section 162-232). When the City of Atlanta Police Department receives a call that a car is being impounded a report is filed in APD's Central Records Section indicating the name, phone number and address of the towing service, the make, model, year, tag number and vehicle identification number of the car being impounded. Therefore, when a person calls in to

make a report that his or her car has been stolen, APD can check the impound and repossession reports to see if the car has been located. Clearly, this notification is vital in assisting the Auto Theft Section in recovering abandoned vehicles and in ensuring that a false police report is not filed regarding the status of an abandoned vehicle. It also can serve to protect citizens of and visitors to the City of Atlanta when they believe their cars have been stolen.

Two recent incidents involving Quality Towing, a wrecker company located in Marietta, Georgia, which is not permitted to operate in the City of Atlanta, have occurred which indicate the need for the permitting of out of city companies who operate within the City limits. One incident involved an impound on a rental vehicle which was subsequently reported stolen. The wrecker service, [sic] did not provide the notification required by City Code Section 162-232. Had the proper notification been made pursuant to this code section at the time the vehicle was reported stolen, information would have already been computerized noting that the vehicle had been impounded and should not have been reported stolen. The lack of proper documentation pursuant to this code section resulted in the reporting party (McFrugal Auto Rental) paying a higher amount to retrieve its car than was necessary.

The second incident involved a used car that had recently been purchased that was picked up by Quality Towing at a private property inside the City of Atlanta limits. The new owner reported the car as being stolen. Quality Towing did not notify the City of Atlanta that it had picked up the car. I assume that Quality Towing did

not provide the notification because they are not permitted in the City of Atlanta. The car then sat on the wrecker service's lot for ninety days. Thereafter, the car was condemned by a Fulton County State Court Judge as a derelict vehicle and sold at a public auction.

8.

I have read this affidavit and declare that it is true and correct to the best of my knowledge and belief.

Further, Affiant sayeth not.

/s/ W.P. Lipscomb
INVESTIGATOR W.P. LIPSCOMB
Atlanta Police Department

Sworn to and subscribed before me
this 20 day of 12, 1996.

/s/ Illegible
Notary Public
My Commission expires:
Notary Public, Henry County, Georgia
My Commission Expires March 22, 1998